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THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

WILLIE BREEDLOVE,
Petitioner,
VS.
STATE OF ALABAMA
Respondent,

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIE BREEDLOVE,
Petitioner,
VS.
STATE OF ALABAMA,
Respondent.

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Question Presented For Review

Do remarks made by the prosecutor stating that the case would have never gotten out of grand jury deny petitioner due process of law?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered on November 4, 1983, denying petitioner's petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama which affirmed petitioner's conviction of the offense of murder.

Opinion Below

Petitioner was found guilty by a jury in the Circuit Court of DeKalb County and sentenced to serve 20 years in the penitentiary. Petitioner's conviction was affirmed on a direct appeal by the Court of Criminal Appeals of Alabama on May 31, 1983, in an opinion published at ____ So. 2d ____ (Ala. Crim. App. 1983). An application for rehearing was denied, without opinion, on July 5, 1983. A petition for a Writ of Certiorari from the Supreme Court of Alabama was denied, without opinion, on November 4, 1983.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3). Petitioner's conviction was affirmed by the Alabama Court of Criminal Appeals and a petition for a Writ of Certiorari from the Alabama Supreme Court was denied on November 4, 1983, and this petition is filed within 90 days thereafter. An Application for Extension of Time has been filed with Mr. Justice Powell on January 30, 1984.

Constitutional Provisions Involved

Fourteenth Amendment to the Constitution of the United States:

"... Nor shall any State deprive any person of life, liberty or property without due process of law ..."

Statement Of The Case

Petitioner was convicted by murder on the basis of arguments made by the prosecutor at his jury trial over petitioner's objections. This petition draws into question the legality of the prosecutor's argument.

On direct appeal from the trial court to the Alabama Court of Criminal Appeals, the court found that the prosecutor's comments in closing argument that the case would never have gotten out of the grand jury did not convey to the jury the impression that the grand jury would not have indicted the petitioner if he had not been guilty. The conviction was affirmed because the Court could not say that the prosecutor's remarks denied petitioner due process of law.

Because the opinion of the Alabama Court of Criminal Appeals, which was later affirmed by the Alabama Supreme Court without opinion, chose to disregard the totality of the circumstances of the comments made during the prosecutor's closing argument, they are set out below.

Although the prosecutor's closing argement was not being recorded, at several points during the prosecutor's final argument the following occurred:

> MR. IGOU: "So, I submit to you that what Louis said is not evidence, and you cannot take it as evidence. I suppose you could have if you wanted to, if he knew the defendant's reputation for telling the truth, but nobody took the stand to tell you that."
>
> MR. WILKINSON: We object to that argument, may it please the Court, that nobody took the stand to testify to the defendant's reputation for telling the truth and would point out that the defendant took the stand, but we object to the argument.
>
> THE COURT: I'll sustain the objection.
>
> MR. IGOU: ..."If he could have proved to you by other witnesses, impartial witnesses, that Terry Cofield was a blood-thirsty, vicious, combative, fighting type person, you can bet you would have heard it."

MR. WILKINSON: Excuse me, please the Court. We object to that argument, for the record again. If it could have been proved that he was that type of individual the defendant would have proved it. We object to that argument as being highly prejudicial, not legally true necessarily, and we object to it and ask the Court to instruct the jury to disregard it.

THE COURT: All right, I'm going to sustain the objection to that. I'll deny the motion.

MR. IGOU: ... "Did you hear any other witnesses testify other than the witnesses that they brought before you and what the defendant himself said about what happened any other way, I submit to you that you would have heard that."

MR. WILKINSON: Now, we object to that, may it please the Court. We object to the inference that if there were any other witnesses available, they would have been brought to them. That, as the Court knows, is not true, and we object to it as being prejudicial argument.

THE COURT: I'll sustain the objection.

MR. IGOU: ... "And I'll tell you this: If defense attorney's -- and it's their job -- but if they had their way about it, wouldn't anybody ever be convicted of it."

MR. WILKINSON: We object to that, may it please the court, that suggests that somebody's in favor of killing, and that is improper.

MR. IGOU: I'm suggesting merely, Your Honor, that the defense attorney would like to have his client acquitted each time. That's all.

THE COURT: I'll overrule the objection.

MR. IGOU: ... "It never would have gotten out of the grand jury. If somebody points a gun at you--"

MR. WILKINSON: Excuse me. We object to that statement, please the Court.

THE COURT: Overruled.

Reason For Granting The Writ

Petitioner's conviction was upheld by the Alabama Court of Criminal Appeals and a petition for a writ of certiorari was denied by the Alabama Supreme Court. Petitioner contended that the prosecutor's remarks during final argement that the case "never would have gotten out of the grand jury. If somebody points a gun at you --," went so far as to convey to the jury the impression that the grand jury would not have indicted the petitioner if he had not been guilty. In rejecting this contention, the Alabama Court of Criminal Appeals reasoned that the remarks made during final argument did not convey to the jury the impression that the grand jury would not have indicted the petitioner if he had not been guilty.

Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial not the culpability of the prosecutor. *See, e.g., Smith v. Phillips*, 455 U.S. 209 (1982). And, this Court has noted as pertinent factors, indicating that such statements made by the prosecutor in agreement did not constitute prejudicial error or deprive the defendant of his right to due process or a fair trial, that the prosecutor's remarks to the jury were made in response to defense counsel's statements in his argument to the jury, *Schaffer v. United States*, 362 U.S. 511, *reh. denied*, 363 U.S. 858 (1960), *Buchalter v. New York*, 319 U.S. 427 (1943); the prosecutor's actions were not purposeful or flagrant, *Frazier v. Cupp*, 394 U.S. 731 (1969), *Singer v. United States*, 380 U.S. 24 (1965); the challenged remarks constituted only isolated or brief episodes in the prosecutor's lengthy argument to the jury, *Donnelly v. De Christoforo*, 416 U.S. 637 (1974), *Berger v. United States*, 295 U.S. 78

(1935); and the trial court had instructed the jury to disregard the prosecutor's improper remarks, *Donnelly*, 416 U.S. at 637, *Berger*, 295 U.S. at 78. In the instant case there is no evidence of the prosecutor responding to defense counsel's statements (Although the closing arguments were not recorded except for the brief portion which was recorded, nothing in the record indicates the prosecutor was responding to defense counsel's statements.), nor were any instructions given by the trial court even after having been requested to by defense counsel.

The prosecutor's comments were neither isolated nor brief. On at least five separate occasions and culminating in a most blatant attack on the very heart of our criminal justice system, the prosecutor made improper and certainly prejudicial comments. In *Berger*, this Court relied heavily on the fact that the prosecutor's conduct was pronounced and persistent, having a probable cumulative effect on the jury, rather than slight or confined to a single instance. And, although the *Berger* case involved a federal prosecution and thus invoked this Court's supervisory power over federal trial courts instead of limiting the review to the narrower due process review of state court proceedings, the *Berger*, decision as to the impropriety of a federal prosecutor's remarks would certainly be entitled to weighty consideration in determining whether similar remarks of a state prosecutor violated the due process rights of the state court defendant. In the *Berger* case, this Court noted,

> The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.
>
> Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

> Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.

Berger v. United States, 295 U.S. 78, 85-89 (1935). While the prosecutor's remarks in the instant case were cumulative and blatant, they must assuredly be purposeful and flagrant since the remarks grew in degree and number. The remarks were compounded only by the trial court's refusal to instruct the jury to disregard them.

In *Hall v. United States*, 150 U.S. 76 (1893), this Court reversed a murder conviction after the prosecuting attorney asserted during closing argument that the defendant in an earlier and unrelated murder trial would have been found guilty save for the fact that the defendant was a white man who had murdered a Black man in Mississippi. The prosecutor insisted that trials in Mississippi of a white man for killing a Black are farces. The defendant instantly objected and excepted to the action of the court in overruling his objections. Concerning the trial judge, this Court noted

> The presiding judge, by declining to interpose, not withstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial.

Ibid., at 81-82

Likewise, in *Graves v. United States*, 150 U.S. 118 (1893), this Court stated

> While we do not wish to be understood as holding that comments by the district attorney upon the facts not in evidence, or statements made having no connection with the case, or exaggerated expressions, such as counsel in the heat of trial are prone to indulge in, will necessarily vitiate a verdict, if not objected to, yet when the attention of the court is called to them specially and objection is made, it is its duty to interfere and put a stop to them if they are likely to be prejudicial to the accused.

Ibid., at 120.

More recently, in *Donnelly v. De Christoforo*, 416 U.S. 637 (1974), this Court affirmed the murder conviction of the defendant and specially noted that the trial court had taken special pains to correct the improper statement of the prosecutor by directing the jury's attention to the prosecutor's remark, declaring it to be unsupported and admonishing the jury to ignore it.

It never would have gotten out of the grand jury. If somebody points a gun at you --

In *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969), the Fifth Circuit faced the statement "we try to prosecute only the guilty" which was stated by the prosecutor in closing argument. There, speaking through Judge Godbold, the court finding the statement not defensible, reversed and explained.

> This statement takes guilt as a pre-determined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them.... Or, arguably it may be construed to mean that as a pretrial administrative matter the defendant has

> been found guilty as charged else he would not have been prosecuted, and that the administrative level determination is either binding upon the jury or else highly persuasive to it. Appellant's trial was held and the jury impaneled to pass on his guilt or innocence, and he was clothed in the presumption of innocence. The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor sit as the thirteenth juror.

Ibid,. at 587 (Footnotes omitted.)

Again, in *United States v. Lamerson*, 457 F.2d 371 (5th Cir. 1972), the Fifth Circuit was faced with a similar remark. And, again, the court reversed. There, the prosecutor made the following statement to the jury: "The Government is prosecuting [the defendant] in line with what [the defense attorney] says. And, [the defendant], had [he] not committed a crime, we would not be doing so. It's as simple as that." *Ibid.*, at 372. The court noted that, in effect, the prosecutor stated that the Government prosecutes only the guilty. The court added that even the lesser suggestion that the Government *tries* to prosecute only the guilty has been held reversible error by the Fifth Circuit and then cited the above-mentioned language in *Hall*.

Most recently, in *United States v. Garza*, 608 F. 2d 659 (5th Cir. 1979), the Fifth Circuit addressed another similar remark. There the court ruled that the prosecutor made an improper argument when he agreed that the prosecution would not have been commenced, and that he personally would not have participated unless it had already been determined that defendant was guilty. At one point, he argued that "those people [the government agents] and the Government has [sic] no interest whatsoever in convicting the wrong person." On rebuttal, he resumed this tack, stating at one point, "And, ladies and gentlemen, if I ever thought that I had framed an innocent man and sent him to the penitentiary, I would quit." And, the court reiterated its earlier position

> This entire line of argument presumed that the whole government apparatus, and the prosecutor individually, had reached a determination of the defendant's guilt before the trial and implied that the jury should give weight to this fact in making its determination.

Ibid., at 665. The court reversed.

Also, in *People v. Rogers*, 90 Cal. App. 3d 368 (1979) the California appellate court determined that the defendant was denied a fair trial guaranteed him by the due process clause when the prosecutor, in his argument to the jury, insinuated that the defendant must be guilty because he was "here" in court.

In the instant case, the statement "It never would have gotten out of the grand jury. If somebody points a gun at you --," rises not only to the level of impropriety, but also to the level of prejudice to the defendant's right to a fair trial.

In *Chapman v. California*, 386 U.S. 18, 24 (1967), this Court held that before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Petitioner submits that here there is at least reasonable doubt.

Although this petition presents nothing new - no new issue of law or unique factual configuration, it presents rather a situation far too common and too often condemned by this Court to be in any manner excusable. By commenting as he did, the prosecutor denied the petitioner due process of law. This sad state of affairs was not cured by the trial judge when he overruled petitioners objection and failed sua sponte to admonish the jury. Therefore, the application of the Fourteenth Amendment is due to be considered.

Conclusion

For the reasons stated herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Court of Criminal Appeals of Alabama entered herein.

DATED:

Respectfully submitted,

Charles A. McGee

Appendix

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

7 Div. 72

Willie Joe Breedlove

v.

State

Appeal from DeKalb Circuit Court

BOWEN, PRESIDING JUDGE

The defendant was indicted and convicted for murder. Sentence was twenty years' imprisonment. One issue is presented on appeal.

The record reflects the following occurred during the prosecutor's closing argument to the jury:

> "MR. IGOU (District Attorney): ... 'It never would have gotten out of the grand jury. If somebody points a gun at you ---.'
>
> MR. WILKINSON (Defense Counsel): Excuse me. We object to that statement, please the Court.
>
> "THE COURT: Overruled."

"An argument to the jury concerning the fact that an indictment had been returned in the case after a hearing of the evidence by the grand jury, and that the grand jury must have believed accused guilty, has been held improper; but a remark or argument relating to prior determination of the facts by the grand jury in indicting accused has been held not to injure substantial rights of accused." 23A C.J.S. *Criminal Law*, Section, 1104.

In argument to the jury, the prosecutor's explanation of "the procedure and processes preliminary to trial of criminal felonies" does not constitute prejudicial error. *Common v. State*, 36 Ala.App. 86, 87, 52 So.2d 415 (1951)
(Prosecutor's reference to the facts that before a defendant could be tried on a criminal charge witnesses had to go before a grand jury and testify and an indictment returned did not injure substantial rights of accused). In *Sisk v. State*, 22 Ala.App. 368, 369, 115 So. 766 (1928), a similar remark was held "not without the bounds of legitimate argument. It simply expressed the opinion of the solicitor as to the effect of the evidence." In *Sisk*, the solicitor argued, "If there is any doubt to be given the defendant, the grand jury, in my judgment, has already given it to him in indicting him for murder in the second degree instead of murder in the first degree." See also *Love v. State*, 31 Ala.App. 584, 586, 20 So.2d 874 (1944) (Statement that he's lucky he's not on trial for murder in the first degree" did not overreach the bounds of proper argument).

These arguments must be distinguished from those of the character of the one condemned in *Wideman v. State*, 40 Ala.App. 5, 7, 110 So.2d 295, affirmed, 269 Ala. 49, 110 So.2d 298 (1957). There the prosecutor argued that "if they hadn't brought enough evidence to convict this defendant the Court would not have allowed the case to go to the jury." Arguments by the prosecutor calculated to give the jury the impression that the court believes the accused guilty are improper and ground for reversal. *Adkins v. State*, 38 Ala.App. 659, 661, 93 So. 2d 519 (1956), cert. denied, 265 Ala. 666, 93 So.2d 522 (1957) (In closing argument the prosecutor remarked that "if the State had not made out a case the court would have taken it from the jury"). However, such remarks may not constitute reversible error if the defendant's objection is sustained and the jury is admonished that the argument is improper. *Adkins*, 265 Ala. at 667. See also *Robinson v. State*, 389 So.2d 144, 149

(Ala.Crim.App.), cert. denied, *Ex parte Robinson*, 389 So.2d 151 (Ala. 1980) (Prosecutor's comment "That's why - the prosecutor's -, -to prosecute the ones that are guilty and dismiss the cases against the ones that are innocent" was not of such magnitude as to be ineradicable). See also *Ross v. State*, 46 Ala.App. 88, 94-95, 238 So.2d 887 (1970) (Remarks were not a cause for reversal where prosecutor stated, "If there had been any question on her part, then under the circumstances, I think it would have been my sworn duty to have told the Court - advise the Court and ask for a nol pros of the case then and there and not go through with any trial").

We strongly condemn any statement by the prosecutor which conveys to the jury the impression that the grand jury would not have indicted the defendant if he had not been guilty. Here, we cannot say that the prosecutor's remarks go that far.

The record reveals only a small portion of what the District Attorney actually said. We have no idea of the context in which the statement was made. The record is too incomplete for this Court to find that it was prejudicial to the defendant. *Embrey v. State*, 283 Ala. 110, 118, 214 So.2d 567 (1968); *Williford v. State*, 365 So.2d 1257, 1258 (Ala.Crim.App. 1978), cert. denied, *Ex parte Williford*, 365 So.2d 1258 (Ala. 1979). The record "does not sufficiently disclose what was said in its context for us to say the argument was improper." *Mincy v. State*, 262 Ala. 193, 196, 78 So.2d (1955). Here, the trial judge was in the best position to determine the prejudicial nature of the objected to remark since he knew the context in which it was made.

Additionally, the objection made was only general and was not sufficient to preserve the alleged error. Where part of the argument objected to was permissible and material, and the objection did not separate the material portion from what was deemed improper, the objection was overruled without error. *Emerson v. State*, 281 Ala. 29, 35, 198 So.2d 613 (1967).

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur

DATED: May 31, 1983

Proof of Mailing - Affidavit

I, Charles A. McGee, attorney for Willie Joe Breedlove, petitioner herein, and a member of the Bar of the Supreme Court of the United States, having previously filed a properly prepared and executed application for admission, hereby certify that, on the 1st day of February, 1984, I deposited in a United States post office located at 301 First Street, N. E., Fort Payne, Alabama 35967, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing an application for extension having previously been filed, the foregoing Petition for Writ of Certiorari.

Charles A. McGee

Subscribed and sworn to before me, at Fort Payne, Alabama, this 1st day of February, 1984.

Brenda A. Wilson

Proof of Service - Certificate By Bar Member

I, Charles A. McGee, attorney for Willie Joe Breedlove, petitioner herein, and a member of the Bar of the Supreme Court of the United States, having previously filed a properly prepared and executed application for admission, hereby certify that on the 1st day of February, 1984, I served copies of the foregoing Petition for Writ of Certiorari on the party thereto, as follows:

1. On the Attorney General of the State of Alabama, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Charles A. Graddick, Esq., Attorney General, at his office, 250 Administrative Building, Montgomery, Alabama 36130.

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BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether a remark made by the prosecuting attorney stating that the case never would have gotten out of the Grand Jury denies a Petitioner due process of law.

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The Opinion of the Alabama Court of Criminal Appeals, published at __ So.2d __ (Ala. Cr. App. 1983), is found at page 11 of the Petitioner's brief presented to this Court as an appendix to said brief.

2. A Petition for a Writ of Certiorari from the Supreme Court of Alabama was denied, without Opinion, on November 4, 1983.

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claim under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Respondent adopts the Statement of the Case as set forth in the Opinion of the Alabama Court of Criminal Appeals in Breedlove v. State, 7 Div 72, Ms. Opinion May 31, 1983 (Ala. Cr. App.), which is included as an appendix to the brief of the Petitioner filed with this Court. That part of the Opinion found on pages 1-2 is quoted:

> "The defendant was indicted and convicted for murder. Sentence was twenty year's imprisonment. One issue is presented on appeal.
>
> The record reflects the following occurred during the prosecutor's closing argument to the jury:
>
> MR. IGOU (District Attorney): '. . . It never would have gotten out of the grand jury. If somebody points a gun at you - -.'
>
> MR. WILKINSON (Defense Counsel): 'Exucse me. We object to that statement, please the Court.'
>
> THE COURT: 'Overruled.'"

The Alabama Court of Criminal Appeals affirmed the conviction of the Petitioner on

May 31, 1983, holding that the above-quoted statement by the prosecutor did not substantially injure the rights of the accused and that said remarks did not constitute reversible error. An application for rehearing was filed by the Petitioner and overruled on July 5, 1983.

A petition for a writ of certiorari was denied by the Supreme Court of Alabama on November 4, 1983, without Opinion. Petitioner then filed the instant petition with this Honorable Court.

REASONS FOR DENIAL OF THE WRIT

A REMARK MADE BY THE PROSECUTING ATTORNEY STATING THAT THE CASE NEVER WOULD HAVE GOTTEN OUT OF THE GRAND JURY DOES NOT DENY A PETITIONER DUE PROCESS OF LAW.

The Petitioner contends in his petition to this Honorable Court that a statement made by the prosecuting attorney during the Petitioner's trial was so unduly prejudicial as to deny the Petitioner due

process of law. The particular statement which Petitioner alleges as a basis for relief to this Court is set out in the appendix to the Petitioner's brief, the Opinion of the Alabama Court of Criminal Appeals. For purposes of this argument, that particular statement is quoted as follows:

> "MR. IGOU (District Attorney): '. . .It never would have gotten out of the grand jury. If somebody points a gun at you - -.'"

Petitioner argues that this statement conveyed to the jury the impression that the Grand Jury would not have indicted the Petitioner if he had not been guilty. The Alabama Court of Criminal Appeals rejected this argument of the Petitioner and in addition thereto held that the particular error urged by the Petitioner as a basis for reversal of his conviction was not properly preserved in the trial court below.

Respondent would submit the following

several grounds as reasons for denying the writ in the present case.

I. FAILURE TO PROPERLY PRESERVE THE THE ISSUE FOR REVIEW AT THE TRIAL COURT LEVEL.

Defense counsel for the Petitioner, at the trial court below, interposed a general objection to the statement of the prosecuting attorney which statement is now urged by the Petitioner as a ground for granting of this writ and reversal of his conviction. A review of the portion of the record as set forth in the Opinion of the Alabama Court of Criminal Appeals reveals that the objection was phrased by defense counsel to two separate sentences made by the prosecuting attorney in his argument to the jury. The Respondent would submit that a review of Alabama state procedural law on this point leads to the conclusion that the alleged error was not properly preserved for review by the objection of defense counsel. In order to properly preserve such an issue for review by Appellate

Courts, a specific objection to the specific part of the closing statement of the prosecuting attorney must be made by defense counsel in order to bring the alleged error to the attention of the trial court for remedial action. Williford v. State, 365 So.2d 1257 (Ala. Cr. App. 1978), cert. denied, 365 So.2d 1258 (Ala. 1979). Further, an objection not separating a permissible statement from an allegedly impermissible statement is properly overruled. Emerson v. State, 281 Ala. 29, 198 So.2d 613 (1967).

Therefore, in compliance with procedural law of the Alabama Courts, defense counsel should have made a specific objection to that specific statement of the prosecuting attorney to which the objection was voiced. The failure of defense counsel to properly preserve this issue for review by the Alabama Appeals Courts pretermits its consideration beyond the trial court level.

II. THE STATEMENT OF THE PROSECUTING ATTORNEY AMOUNTED ONLY TO AN EXPLANATION OF PROCEDURE AND PROCESSES PRELIMINARY TO THE TRIAL OF A CRIMINAL FELON AND AS SUCH DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS.

The cases relied upon by Petitioner in his brief to this Court deal with situations wherein the prosecuting attorney's closing argument was closely scrutinized by this Court and either approved or disapproved, based on the content of the statement and its application to the particular facts of cases involved. In its opinion, the Alabama Court of Criminal Appeals referred to prior cases decided by the Courts of Alabama which dealt with alleged prosecutorial misconduct in argument to the jury. In the case of Sisk v. State, 22 Ala. App. 368, 115 So. 766 (1928), the prosecutor's statement referred to the doubt owed a criminal defendant in having already been given to him by the Grand Jury's

indicting of the defendant for murder in the second degree instead of murder in the first degree. The Alabama Court of Criminal Appeals in that case held that such comment was not so unduly prejudicial as to deny the defendant due process of law. In the case of Common v. State, 36 Ala. App. 86, 52 So.2d 415 (1951), the prosecuting attorney stated to the jury in his closing argument that before a defendant can be tried on a criminal charge witnesses had to go before a Grand Jury and testify and an indictment returned against the defendant before he could be tried. In that case the Court held that this statement amounted only to an explanation of the procedure and processes preliminary to the trial of a criminal felony. As such, the comment was not improper.

Respondent would submit that these prior cases of the Alabama Courts reflect, that for substantative purposes, the statement in the instant case did not constitute such improper

conduct by the prosecutor as to necessitate a retrial of the Petitioner. The alleged misconduct of the prosecutor in his closing argument to the jury in the instant case fails to rise to the magnitude of those cases relied upon by the Petitioner as grounds for reversal of his conviction.

Respondent would also submit that the Petitioner has failed to show unto this Court any cases decided by this Honorable Court wherein a statement such as that in the case at bar has been held to be of such a prejudicial error as to require a reversal of a criminal defendant's conviction.

III. THE ALLEGED MISCONDUCT OF THE PROSECUTOR IS INSUFFICIENT IN AND OF ITSELF TO REQUIRE A NEW TRIAL OF THE PETITIONER.

The Petitioner argues to this Court that the conduct of the prosecutor at the trial of the Petitioner was so improper so as to deny the Petitioner of due process of law.

However, it appears that the only alleged prosecutorial misconduct centers on the closing argument of the prosecutor to the jury at the trial of the Petitioner. In the case of Donnelly v. DeChristoforo, 416 U.S. 637 (1974), this Court stated as follows:

> ". . .a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretation." At page 647.

The reasoning in that opinion was that the statement of the prosecuting attorney must be taken in view of the total trial rather than to isolate that statement and take it out of context. The Court in that case further went on to find that there was no denial of constitutional due process in the statement by the prosecuting attorney as such had been eradicated by the trial court judge.

Petitioner's main reliance is based on the case of Berger v. United States, 295 U.S. 78 (1935). However, Respondent would refer this Court also to that part of the Berger case wherein the Court stated that if the evidence against the petitioner at his trial had not been so weak then the Supreme Court probably would have reached a different result as to the impropriety of the statement of the prosecutor during his closing argument to the jury. Respondent would submit that the facts in the instant case are not weak against the Petitioner in proving the offense with which he was charged. Rather, the facts are "overwhelming" in implicating the Petitioner for the crime for which he now stands convicted. Respondent would also submit that the comment of the prosecuting attorney in the Berger case, that being an assertion of personal knowledge of the prosecutor concerning evidence and a particular witness, is so different substantively from the statement in

the particular case before this Court now that it renders the Berger rationale inapplicable to the instant petition.

Finally, Respondent would submit that the standard of review applied by this Court leads to the conclusion that the alleged prosecutorial misconduct is an insufficient basis for granting of the writ in the instant case. As set forth in the case of Smith v. Phillips, 102 S.Ct. 940 (1982):

> :. . .touchstone on due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." At page 947.

The Court further held that the lower court's finding that prosecutorial misconduct alone required a new trial was erroneous. Respondent would submit that an applicaiton of this same legal logic results in a finding that the alleged prosecutorial misconduct in the instant case fails to rise to such a level that the Petitioner was thereby denied due process of law.

CONCLUSION

Based on the foregoing argument the Respondent would submit that the writ of certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submitted,

/s/ Charles A. Graddick
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ATTORNEY GENERAL OF
ALABAMA

/s/J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
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CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the _____ day of March, 1984, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Honorable Charles A. McGee
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/s/ J. Anthony McLain
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